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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of CompTel's Petition on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act	CC Docket No. 98-39

REPLY COMMENTS OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY

MADELYN M. DEMATTEO
ALFRED J. BRUNETTI
THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY
227 Church Street
New Haven, Connecticut 06510
(203) 771-5200

MARK L. EVANS
GEOFFREY M. KLINEBERG
REBECCA A. BEYNON
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for The Southern New England Telephone Company

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The Southern New England Telephone Company ("SNET") demonstrated in its initial comments that CompTel's proposed interpretation of section 251(h) is inconsistent with the statute, with the Commission's ruling in the Non-Accounting Safeguards Order,[1] and with sound telecommunications policy. The comments filed in response to CompTel's petition only reinforce this conclusion. In addition, the Commission lacks jurisdiction to issue rules regarding the definition of "successor or assign" for purposes of section 251. The Commission therefore should deny CompTel's petition.

1. The Commission Lacks Jurisdiction to Issue Rules Binding on the States Regarding the Definition of "Successor or Assign" for Purposes of Section 251

The definition of "successor or assign" under section 251(h)(1)(B)(ii) of the Act is a matter bearing solely on intrastate communications and for that reason lies beyond the FCC's regulatory

[1] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 22054-58 [¶¶ 309-317] (1996) aff'd, Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044 (D.C. Cir. 1997) ("Non-Accounting Safeguards Order").

jurisdiction. As the Supreme Court explained in Louisiana Public Service Commission v. FCC, 476 U.S. 355, 377 (1986), section 2(b) of the Communications Act "fence[s] off from FCC reach or regulation intrastate matters." Id. Only an "unambiguous" and "straightforward" grant of specific intrastate jurisdiction to the Commission "can override the command of [section 2(b)]." Id. In the 1996 Act, Congress deliberately left section 2(b) in place, thereby ensuring that States would have flexibility to adapt the Act to fit local needs. Where Congress intended to give the FCC jurisdiction over intrastate telecommunications, it stated so expressly.[2] See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 798 (8th Cir. 1997) ("[T]he statute must . . . directly grant the FCC such intrastate authority in order to overcome the operation of section 2(b)."), cert. granted, 118 S. Ct. 879 (1998).

Section 251(h)(1)(B)(ii) gives the Commission no authority to dictate to the States the meaning of the term "successor or assign." In the absence of an express congressional directive to the contrary, State commissions — not the FCC — have authority to determine what constitutes a "successor or assign" of an incumbent LEC providing telephone exchange services within that State. An FCC ruling on this issue would overstep the careful jurisdictional boundaries prescribed

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[2]For example, Congress gave the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering," including the responsibility to make numbers available "on an equitable basis." 47 U.S.C. § 251(e)(1). It also gave the FCC a role in defining a carrier's duty to provide "number portability," id. § 251(b)(2) (requiring carriers to provide "number portability in accordance with requirements prescribed by the Commission"); in determining what network elements should be unbundled, id. § 251(d)(2) (enumerating factors that FCC must consider "[i]n determining what network elements should be made available for purposes"); in prescribing permissible resale restrictions, id. § 251(c)(4)(B) (State commission limitations on resale must be "consistent with regulations prescribed by the Commission under this section"); and in providing for the treatment of comparable carriers as "incumbents," id. § 251(h)(2) ("[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier").

by Congress, and the Commission should therefore reject CompTel's petition as outside the scope of its authority.

2. Even Assuming the Commission Has Jurisdiction to Resolve this Issue, CompTel's Proposal Is Inconsistent with the Telecommunications Act and with the Commission's Precedent

Even assuming that the Commission has jurisdiction to resolve this matter, the Telecommunications Act and the Commission's precedent preclude it from adopting CompTel's proposal. CompTel and its supporters want a standard that would essentially mean that any affiliate of an incumbent carrier that offers local exchange service in the incumbent's territory is subject to all the obligations imposed on incumbents. As SNET demonstrated in its opening comments, the Commission has already refused to interpret the term "successor or assign" in this way. It has concluded that an affiliate cannot become a "successor or assign" of an ILEC unless that affiliate owns or controls the ILEC's local exchange network facilities. Non-Accounting Safeguards Order, 11 FCC Rcd at 22054 [¶ 309]. Nor does an affiliate become a "comparable" carrier under section 251(h)(2) unless it controls the local exchange market and has supplanted a section 251(h)(1) incumbent carrier.

The Commission's understanding of "successor or assign" is consistent with the statutory distinction that Congress drew between the terms "affiliate" and "successor or assign." See, e.g., 47 U.S.C. § 153(4) (a Bell operating company includes "any successor or assign," but "does not include an affiliate of any such company"). It also enables the affiliates of incumbent carriers to compete effectively with other local exchange carriers, thereby giving consumers a more diverse array of local service offerings and enhancing competition in the local exchange markets. See Non-Accounting Safeguards Order, 11 FCC Rcd at 22057-58 [¶ 315]. Moreover, the

Commission's interpretation gives State commissions the latitude to determine how best to facilitate competition under the circumstances unique to their States.

3. AT&T and MCI Wrongly Allege that SNET Has Evaded its Section 251 Obligations Through Corporate Restructuring

As SNET discussed in its initial comments, there is no basis for CompTel's distorted reading of section 251(h). CompTel simply asserts, without substantiation, that unless the Commission takes the action that CompTel wants, incumbent carriers will try to evade their statutory obligations by offering local exchange services through corporate affiliates. But CompTel and its supporters have entirely ignored the host of statutory and regulatory safeguards that are in place to ensure nondiscrimination and to punish self-dealing.

For the most part, none of the commenters has done anything more than reiterate the same unsupported assertions presented in the petition. AT&T and MCI, however, have gone further; they both have singled out SNET as an example of a LEC that has sought to evade its resale obligations through its recent corporate restructuring. See AT&T Comments at 4 n.5; MCI Comments at 4, 5, 8, 12-13. These claims are patently false. That these commenters resort to distorting grossly the facts surrounding SNET's restructuring discredits their entire presentation.

Connecticut has led the nation in removing barriers to competition in its local telecommunications market. Anticipating Congress by nearly two years, the Connecticut legislature enacted in 1994 a framework for the entry of new carriers into Connecticut's local exchange market, requiring SNET to open its networks to competitors through interconnection, unbundling, and resale requirements.[3] In early 1997, to enable the company better to meet the

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[3]See An Act Implementing the Recommendations of the Telecommunications Task Force, Public Act 94-83 (codified at Conn. Gen. Stat. § 16-247a, et seq.).

demands placed on it by state and federal laws, SNET asked the Connecticut Department of Public Utility Control ("DPUC") for permission to restructure its operations into retail and wholesale business units.

Under the restructuring plan, which the DPUC approved on June 25, 1997, SNET will no longer offer retail local exchange services to end users.[4] Retail services will be provided by SNET America, Inc. ("SAI"), SNET's corporate affiliate. SNET will, however, continue to sell to requesting carriers all its existing local exchange services at wholesale rates for resale.

In their comments in this proceeding, MCI and AT&T incorrectly assert that the SNET Restructuring Decision permits SNET to evade its section 251(c) resale obligations. See MCI Comments at 4 (alleging that the DPUC has concluded that the resale duties of section 251(c)(4) no longer apply to SNET); AT&T Comments at 4 n.5 (claiming that SNET has sought to restructure itself into wholesale and retail operations to escape its resale obligations). In addition, MCI claims that the DPUC ruled that SAI would "inherit" all of SNET's retail customers and that the DPUC has deprived competing carriers of the opportunity to purchase at wholesale the service packages and promotions that are offered by SAI, but not by SNET. MCI Comments at 4. Finally, MCI implies that SNET has accorded its affiliate preferential treatment, including making available operations support systems ("OSS") that it has withheld from competitors. MCI Comments at 12-13.

These allegations are false. In fact, the DPUC specifically ruled that "[n]othing presented in [the restructuring] proceeding alters the opinion of the Department that the Telco remains

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[4]Decision, DPUC Investigation of the Southern New England Telephone Co. Affiliate Matters Associated with the Implementation of Public Act 94-83, Docket No. 94-10-05 (Conn. DPUC June 25, 1997) ("SNET Restructuring Decision").

subject to the duties and obligations set forth in §§ 251 and 252 of the 1996 Federal Act." SNET Restructuring Decision at 64. Accordingly, it conditioned its approval of the SNET corporate restructuring on the requirement that SNET's wholesale division continue to provide all the telephone exchange and exchange access services, at the same wholesale prices, that it had provided before the restructuring. "Any modification to the current complement of . . . services, either in scope or price, requires the review and approval of the Department." Id.; see also id. at 61 ("On a going-forward basis, [SNET] will continue to operate as an ILEC for purposes of enforcing §§ 251 and 252 of the 1996 Federal Act and as a telephone company for purposes of [Connecticut law]."). Thus, far from exempting SNET from section 251(c)'s requirements, the Connecticut DPUC made clear that SNET will remain subject to those obligations.

Nor is there any substance to MCI's claim that SAI will "inherit" all of SNET's retail customers. MCI Comments at 4. In actuality, "the mechanics of the reorganization provides customers the option to affirmatively choose their carrier." SNET Restructuring Decision at 49. Specifically, the DPUC's decision mandates a "fresh-look" and a balloting process. Under the fresh-look process, all of SNET's existing business customers that currently have contracts with SNET for noncompetitive telecommunications services will be released from their contracts without incurring any penalties. Id. at 51. During the fresh-look period, these customers will have the option of choosing to purchase services from among the many carriers certified to provide services in Connecticut, including AT&T, MCI, and other competing carriers. Id.

The balloting process — the first of its kind in the country — will permit residential and business customers to select their local service provider from among carriers certified to provide local exchange service in Connecticut. Id. at 55. This impartial election process will resemble the

process that the FCC prescribed in the 1980's for the interstate long-distance market. At the conclusion of the balloting process, SNET will no longer have any retail end-user customers, and it will be permitted to withdraw its retail tariffs. Id. at 55-56. As discussed above, however, it will continue to offer the same services on a wholesale basis to all competing carriers.

MCI's contention that the DPUC's restructuring decision has deprived competing carriers of the opportunity to purchase at wholesale the service packages and promotions that are offered by SAI but not by SNET is completely misleading. Just like MCI and AT&T, SAI will construct its retail telecommunications services from SNET's wholesale offerings. Id. at 58. F"Those [SNET] wholesale offerings used by SAI to construct its retail telecommunications services remain subject to the general availability requirements stipulated for such services in both [Connecticut law] and § 251(c)(4) of the 1996 Federal Act." Id. And just as AT&T and MCI have no obligation to make their services available at a wholesale discount for resale, SAI will have no such obligation. But "[a]ny effort or ability of SAI to control availability of underlying technology available from [SNET] would be counter to the interests of the public and [the DPUC]. The Department will hold the Telco accountable in future proceedings to ensure that its administrative and operational support for a broader set of SAI products and services does not discriminate against other market participants." Id.

Thus, after the restructuring, all competing carriers will have the same opportunity as SAI to purchase from SNET the wholesale services from which they may construct their retail offerings. The DPUC promised that it will continue to examine SNET's wholesale offerings "to ensure that its administrative and operational support for a broader set of SAI products and services does not discriminate against other market participants." Id. In addition, the DPUC made

clear that it "will aggressively seek to increase the range of telecommunications services and unbundled network elements that will be available in the future to [competing carriers] from [SNET]." Id. at 64. To this end, "any proposed act by [SNET] to reduce the complement of product/service offerings available to [competing carriers] will be critically scrutinized by the Department for its impact upon the development of competitive markets in Connecticut." Id.

Finally, MCI's allegation that SNET has played favorites with respect to SAI's access to its operations support systems is yet another fabrication. According to MCI, SNET has OSS available only for resale orders, and not for services provided through unbundled network elements. MCI Comments at 13. MCI alleges that, because SAI may provide service mostly by reselling SNET's services, whereas MCI and other competitors may enter the market through the use of unbundled network elements, SAI will have an advantage over facilities-based carriers. Id.

The DPUC directly addressed the issue of discriminatory access to OSS. SNET must certify to the DPUC that all competing carriers have access to SNET's OSS equivalent to that provided to SAI. If SNET cannot make such warranties, SNET must "reduce the level of . . . operational support proposed for SAI to a level that is equal to or less than that available to nonaffiliate CLECs." SNET Restructuring Decision at 57. Thus, all competing carriers in Connecticut will have equal access to OSS.[5]

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[5]The DPUC also imposed on SNET an extensive set of accounting and non-accounting structural safeguards to ensure that SNET does not abuse its relationship with SAI. See id. at 68-71. Among other things, SNET must maintain books, records, and accounts separately from SAI; it must have separate officers, directors, and employees; and it must certify that it will conduct all transactions with SAI on an arm's-length basis. Id. at 70. Any failure by SNET to meet these conditions "will be considered sufficient cause" for the DPUC to rescind SAI's authorization to operate as a competing carrier and to initiate a reexamination of the restructuring decision. Id.

In compliance with the DPUC's directive, SNET will provide OSS access to SAI that is the same as that made available to other competing carriers. Specifically, a nationally standardized electronic data interexchange ("EDI") interface is currently available for resale products and for some unbundled network elements. Additional unbundled network elements will be available via the EDI interface in the third quarter of 1998. SNET has also filed with the DPUC an implementation plan outlining the availability, as of July 1, 1998, of another method of interfacing with SNET's OSS, which will provide competing carriers with access for all resale services. In the meantime, if a competing carrier cannot order a particular product on a mechanized basis, SAI may not do so either, but must instead order the product on a manual basis.

In sum, MCI's and AT&T's allegations regarding SNET are untrue.[6] The long and short of the matter is that CompTel's supporters are unable to point to a single concrete example that demonstrates a need for CompTel's proposal. There is a good reason for this deficiency in their pleadings: although numerous States have authorized the provision of local exchange service by affiliates of incumbent carriers, in none of these circumstances has an affiliate gained an unfair competitive advantage over other competing carriers, nor has an incumbent used its affiliate to

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[6]MCI does not limit its inventions to SNET. It also asserts that, "[i]n recognition of [the] dangers" that ILECs could use their local service affiliates to avoid their section 251 and 252 obligations, the Texas Public Utility Commission denied GTE's long-distance affiliate's application to provide both local and long-distance service in areas in which GTE was an incumbent carrier. MCI Comments at 8. Not so — the Texas Commission's reason for denying this application had nothing to do with section 251. Rather, it based its decision exclusively on a Texas statute that bars a corporation from holding multiple licenses in the same territory. Order, Application of GTE Communications Corp. for a Certificate of Operating Authority, Docket No. 16495, SOAH Docket No. 473-96-1803 (Tex. PUC Nov. 20, 1997).

avoid its statutory obligations.[7] For these same reasons. there is no need for the kind of rulemaking suggested by AT&T.

In the end, MCI's and AT&T's arguments regarding SNET and the Connecticut experience backfire on them. Congress expected the unique circumstances within each State to give rise to a range of regulatory experiments. It gave State commissions primary jurisdiction to decide in the first instance how best to implement and foster competition local exchange markets. The efforts of the Connecticut DPUC to cultivate genuine competition are precisely the kind of local initiatives that the 1996 Act was designed to encourage. CompTel's proposal, quite apart from its illegality, is simply wrong-headed as a matter of public policy.

CONCLUSION

For the reasons stated above and for the reasons stated in its initial comments, SNET respectfully urges the Commission to deny CompTel's petition.

Respectfully submitted,

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[7]See BellSouth Comments at 6 (noting that, to date, eighteen State commissions have authorized ILEC affiliates to offer local exchange service within and beyond the franchised territory of their ILECs).

MADELYN M. DEMATTEO
ALFRED J. BRUNETTI
THE SOUTHERN NEW ENGLAND
TELEPHONE COMPANY
227 Church Street
New Haven, Connecticut 06510
(203) 771-5200

MARK L. EVANS
GEOFFREY M. KLINEBERG
REBECCA A. BEYNON
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for The Southern New England Telephone Company

June 1, 1998

CERTIFICATE OF SERVICE

I, Jonathan A. Rabkin , hereby certify that on this 1st day of June 1998, copies of the Reply Comments of The Southern New England Telephone Company were served upon the parties listed on the attached service list either by hand delivery (as indicated by an *) or first-class mail, postage prepaid.

Jonathan A. Rabkin

SERVICE LIST

CC Docket No. 98-39
Petition on Defining Certain Incumbent LEC Affiliates
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Under Section 251(h) of the Communications Act

Magalie R. Salas (*hand delivery)
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Janice M. Myles (*hand delivery)
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

International Transcription Services
(*hand delivery)
1231 20th Street, N.W.
Washington, D.C. 20036

Genevieve Morelli
Competitive Telecommunications Assoc.
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036

David L. Sieradzki
Jennifer A. Purvis
Hogan & Hartson
555 13th Street, N.W.
Washington, D.C. 20004

Chérie R. Kiser
A. Sheba Chacko
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(Counsel for Intermedia Communications Inc.)

Cathleen A. Massey
NEXTLINK Communications, Inc.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, DC 20036

Daniel M. Waggoner
James S. Blitz
Robert S. Tanner
Davis Wright Tremaine LLP
1155 Connecticut Avenue
Suite 700
Washington, DC 20036

James G. Palchulski
Bell Atlantic
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

David W. Zesiger
Donn T. Wonnell
ITTA
1300 Connecticut Avenue, N.W.
Suite 600
Washington, DC 20036

L. Marie Guillory
NTCA
2626 Pennsylvania Avenue, N.W.
Washington, DC 20037

Teresa Marrero
Teleport Communications Group Inc.
Two Teleport Drive
Staten Island, NY 10311

Patricia L. C. Mahoney
SBC Communications Inc.
140 New Montgomery Street, Room 1523
San Francisco, CA 94105

Robert M. Lynch
Durward D. Dupre
SBC Communications Inc.
One Bell Plaza, Room 3703
Dallas, TX 75202

R. Michael Senkowski
Jeffrey S. Linder
Timothy J. Simeone
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, DC 20036

John F. Raposa
GTE Service Corporation
600 Hidden Ridge, HQE03J27
Irving, TX 75038

Richard J. Metzger
Emily M. Williams
ALTS
888 17th Street, N.W., Suite 900
Washington, DC 20006

Brad E. Mutschelknaus
John J. Heitman
Kelley, Drye & Warren, LLP
1200 19th Street, N.W., Fifth Floor
Washington, DC 20036

Riley M. Murphy
James C. Falvey
e.spire Communications, Inc.
133 National Business Parkway, Suite 200
Annapolis Junction, MD 20701

Gary L. Phillips
Ameritech Corporation
1401 H Street, N.W., Suite 1020
Washington, D.C. 20005

Peter A. Rohrbach
Linda L. Oliver
Hogan & Hartson, L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Anne K. Bingaman
Douglas W. Kinkoph
LCI International Telecom Corp.
8180 Greensboro, Drive, Suite 800
McLean, VA 22102

Linda Kent
Keith Townsend
Lawrence Sarjeant
U.S. Telephone Association
1401 H Street, N.W., Suite 600
Washington, DC 20005

Andrew D. Lipman
Mary C. Albert
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, DC 20007
(Counsel for KMC Telecom Inc.)

Catherine R. Sloan
Richard L. Fruchterman, III
Richard S. Whitt
David N. Porter
WorldCom, Inc.
1120 Connecticut Avenue, N.W., Suite 400
Washington, DC 20036

Leon M. Kestenbaum
Jay C. Keithley
H. Richard Juhnke
Sprint Corporation
1850 M Street, N.W., 11th Floor
Washington, DC 20036

Michael J. Shortley, III
Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Mark C. Rosenblum
Leonard J. Cali
James W. Grudus
AT&T
Room 3250G3
295 North Maple Avenue
Basking Ridge, NJ 07920

Frank W. Krogh
Mary L. Brown
MCI Telecommunications Corporation
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006

William B. Barfield
M. Robert Sutherland
David G. Richards
BellSouth Corporation
1155 Peachtree Street, N.E., Suite 1800
Atlanta, GA 30309-3610

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W., Suite 701
Washington, DC 20006
(Counsel for Telecommunications
Resellers Association)

Albert H. Kramer
Michael Carowitz
Dickstein Shapiro Morin
& Oshinsky
2101 L Street, N.W.
Washington, D.C. 20037

Cindy V. Schonhaut
ICG Communications, Inc.
161 Inverness Drive West
Englewood, CO 80112